Supreme Court, U.S.
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No. 94-8

In the
Supreme Court of the United States
October Term, 1994

BARRY NAKELL,
Petitioner,

v.

ATTORNEY GENERAL OF
NORTH CAROLINA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER PETITIONER'S HABEAS ACTION IS MOOT DUE TO EXPIRATION OF HIS 10-DAY JAIL SENTENCE AND ABSENCE OF LEGAL COLLATERAL CONSEQUENCES?

2. WHETHER PETITIONER'S SUMMARY CONTEMPT OF COURT PROCEEDING BEFORE JUDGE LAKE WAS CONSISTENT WITH DUE PROCESS?

3. WHETHER EVIDENCE WAS SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR DIRECT CRIMINAL CONTEMPT OF COURT?

4. WHETHER PETITIONER'S HABEAS ACTION IS *TEAGUE* BARRED?

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BRIEF IN OPPOSITION

STATEMENT

On November 14, 1989, a pretrial hearing was held in the Superior Court of Robeson County, North Carolina, before Honorable I. Beverly Lake, Jr., in *State v. Eddie Hatcher*, in which Hatcher was charged with multiple felony counts of second-degree kidnapping. Judge Lake noted previous orders entered by other superior court judges. The first order, entered January 26, 1989 by Honorable Anthony M. Brannon, appointed the Public Defender, Angus Thompson, to represent Hatcher. The second order, entered September 5, 1989, by Honorable Robert L. Farmer, held

out-of-state attorneys, William N. Kunstler and Ronald L. Kuby, had not complied with N.C. GEN. STAT. § 84-4.1 (1985) governing out-of-state counsel, had never been admitted to practice *pro hac vice* and had not acquired eligibility to appear on behalf of Hatcher. The third order, entered September 6, 1989, by Judge Farmer found Hatcher had dismissed "the Public Defender as his attorney; and that when asked by the court if he wished to represent himself, the Defendant did not answer yes." The order stated the Public Defender was counsel for Hatcher "until the court receives in writing from the Defendant a statement that he plans to represent himself and does not wish to have the services of the Public Defender or that he has retained counsel licensed in North Carolina along with their name and address and a notice of a general appearance filed by said attorney with the Court."

The final order, entered October 16, 1989 by Judge Farmer arose upon motions that three out-of-state attorneys be allowed to represent Hatcher *pro hac vice*. The court concluded § 84-4.1 had not been complied with and "the Court is without power to allow or reject the applications or motions by the said out-of-state attorneys to appear in this case." The court ordered "the Public Defender of Judicial District 16-B is still counsel of record for the Defendant."[1]

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[1] Respondent does not concede Judge Farmer's orders were illegal. Furthermore, the Supreme Court of North Carolina did not "vindicate" Petitioner's position with regard to the orders. The court simply vacated without comment (continued...)

The pre-trial hearing of November 14, 1989, began with Judge Lake noting for the record the aforementioned orders. The court also had before it a motion by defendant Hatcher to proceed *pro se* and a motion for reconsideration for the out-of-state attorneys to appear in the case on behalf of Hatcher. The motion for reconsideration also requested the court to "clarify the status of Mr. Barry Nakell, requesting that he be permitted to enter a limited appearance in the case." Judge Lake responded:

> The Court has considered that in light of the referenced order of September 6 of 1989 by Judge Farmer which Judge Farmer specified that any appearance must be a general appearance filed by an attorney on behalf of the defendant.

Nakell, who had entered the courtroom during the proceedings and tendered a notice of limited appearance to the clerk, interrupted the court and asked to be heard. Judge Lake said "[n]o, [s]ir, not at this point." Nakell interrupted again and Judge Lake informed him his notice of limited appearance was not in compliance with Judge Farmer's September 6 order. Nakell continued and Judge Lake told him "[n]o, [s]ir, Mr. Nakell, I'm not going to hear you." When Nakell continued to talk Judge Lake responded "I said I'm not going to hear you. Sit down. Sit down." The court then asked Nakell "[d]o you want to be removed from this courtroom?" Nakell continued to talk and again Judge Lake

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[1](...continued)
and allowed the trial court to start over again. *State v. Hatcher*, 326 N.C. 52, 389 S.E.2d 100 (1990).

told him "I said sit down, Mr. Nakell. That's a direct order from the Court."

When Nakell continued to speak, Judge Lake said "[d]o you want to be held in direct criminal contempt of this Court?" At that point, Hatcher blurted obscenities and Nakell continued to speak. Judge Lake responded "I am directing you specifically to sit down and be quiet." A few minutes later Nakell spoke and Judge Lake told Nakell "I'm going to direct you not to interrupt me now. If you want to . . . pose a question to the Court, you do so through Mr. Thompson." Nakell refused to comply and Judge Lake said "[t]he Court does not recognize your representation of this defendant." Finally, Judge Lake said "[w]ell, let me see if I can make you understand, Mr. Nakell. I am denying your request for a limited appearance on behalf of this defendant and I'm directing you to sit down and be quiet and not say another word to the court except if you want to say something, do it through Mr. Thompson." Then, without sitting down, Nakell turned to Mr. Thompson and in the same tone of voice used to address the court, said, "[a]ll right. Mr. Thompson, would you inquire about the basis - legal basis for a licensed North Carolina attorney from appearing on behalf of a defendant in a criminal case in association with a public defender -". Judge Lake tried to interrupt Nakell and Hatcher blurted obscenities while Nakell continued to talk. At this point, Judge Lake ordered the bailiff to remove Nakell from the courtroom. Hatcher then threw two pens at the bench, blurted more obscenities and was removed from the courtroom. Later, Hatcher was returned and the proceedings continued.

At the conclusion of the pre-trial motions hearing, Nakell was brought back into the courtroom and advised of the specific conduct considered to be in direct criminal contempt of court: (1) refusal to sit down after a direct order to do so; (2) refusal to be quiet after a direct order to do so; (3) continual interruption of the presiding judge by speaking over the voice of the court; (4) disrupting the court proceedings; (5) unduly prolonging the court proceedings; and (6) pandering to the courtroom audience, and encouraging Hatcher to be disruptive of the court. Judge Lake continued the matter for further consideration to November 16, 1989. Prior to the November 16 hearing, Judge Lake requested attorneys and other courtroom personnel who were present during the hearing of November 14, 1989 to provide affidavits describing their observations. At the November 16 hearing, Nakell, through his attorney, requested the matter be continued so as to place it before another judge. Judge Lake denied the request noting the contempt proceeding was a continuation of the matter on November 14, 1989, which "could have been summarily adjudicated and determined by the Court at that time." But in deference to Nakell was continued until November 16, 1989.

Assistant Public Defender Neil Webber testified that when Nakell was ordered to communicate to the court only through Mr. Thompson, Nakell turned toward Thompson and spoke to him in a voice loud enough for Webber to hear. Mr. Webber was seated on the second row of the audience behind the defense table. The tone of Nakell's voice "was loud enough that I could hear it . . . [a]nd he certainly

wasn't whispering." "It was vocal, and I could hear his voice the entire time." Public Defender Angus Thompson testified he did not feel Nakell was trying to disrupt the proceeding, "[n]evertheless, after repeatedly being told to sit down, and, of course, on one occasion being told to speak to me, [Nakell] again arose and began addressing the court." Mr. Thompson also stated that pursuant to the court's instructions to Nakell on November 14, 1989, he would have "turn[ed] and probably in a lower voice communicate[d] with counsel, . . .".

Nakell testified he did not intend to disrupt the proceedings. He said he was aware of the orders of September 5 and 6, 1989 entered by Judge Farmer. Nakell admitted it was clear to him "the Court was ruling that I should not appear in the case." In addition, Nakell testified, "I understand that you [Judge Lake] wanted me not to address the Court directly, but that I could participate in the proceedings through Mr. Thompson." Nakell stated, "I looked at Mr. Thompson and spoke to him in a voice that was loud enough that I thought he - he could hear. It may well be that it could be heard by others as well." At that point Nakell "heard some applause." Nakell "suppose[d]" the applause was in direct response to his statement to Mr. Thompson.

District Attorney Richard Townsend testified Nakell entered the courtroom during on-going proceedings, handed him a copy of his notice of limited appearance, and attempted to address the court. The court indicated it would not hear him at that time but Nakell continued to interrupt

and was told to sit down and be quiet. The court said it was not recognizing Nakell's appearance and on one occasion the public defender, Mr. Thompson, even asked Nakell to sit down and be quiet. The court warned Nakell about contempt and finally told him if he had any questions to ask them through Mr. Thompson. At that point, ". . . Nakell, who was still standing, turned and looked at Mr. Thompson and in the same voice he had - was addressing the Court, addressed Mr. Thompson to inquire - or make the same inquiry that Mr. Nakell had just made to the Court." At that point, there was applause from Hatcher's supporters in the audience and the court instructed the bailiff to remove Nakell from the courtroom. At the conclusion of the summary contempt hearing Judge Lake entered lengthy findings of fact and conclusions of law. (App 1a) Whereupon, Judge Lake found Nakell guilty of direct criminal contempt of court and sentenced him to ten days in jail and a $500.00 fine.

Petitioner appealed to the North Carolina Court of Appeals which found no error on December 17, 1992. *In re Nakell*, 104 N.C. App. 638, 411 S.E.2d 159 (1991), *appeal dismissed and discretionary review denied*, 330 N.C. 851, 413 S.E.2d 556 (1992). The court found evidence sufficient to support the conviction and held the summary contempt proceeding complied with due process. The court also held the requirement of N.C. GEN. STAT. § 5A-14 (1986) that a summary contempt proceeding be conducted "substantially contemporaneously" with the contempt was satisfied even though the on-going proceeding was continued for forty-eight hours. *Nakell*, 104 N.C. App. at 649, 411 S.E.2d at 165. The Supreme Court of North Carolina dismissed Petitioner's

appeal and denied discretionary review on January 30, 1992.

Petitioner then filed an application for federal habeas relief in the United States District Court for the Eastern District of North Carolina. Honorable Malcolm J. Howard denied the petition on February 25, 1992. Judge Howard found evidence sufficient to support Petitioner's conviction and held the contempt proceeding complied with due process. "This court is convinced that justice and fairness did prevail throughout these proceedings and Petitioner was afforded every due process right." The United States Court of Appeals for the Fourth Circuit, Chief Judge Ervin presiding, affirmed the district court decision on January 27, 1994. *Nakell v. Attorney General of North Carolina*, 15 F.3d 319 (4th Cir. 1994). Rehearing was denied on March 4, 1994. Although the Court of Appeals rejected Respondent's argument that Petitioner's case became moot upon completion of his ten-day jail sentence, the Court of Appeals found sufficient evidence to support Petitioner's conviction. The Court of Appeals also found the 48-hour continuance of the on-going summary contempt proceeding was consistent with due process as articulated in *Sacher v. United States*, 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952); *Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964) and *Paul v. Pleasants*, 551 F.2d 575 (4th Cir.), *cert. denied*, 434 U.S. 908, 98 S. Ct. 310, 54 L. Ed. 2d 196 (1977). In addition, the Court of Appeals concluded Judge Lake did not become "personally embroiled" with Petitioner so as to violate due process. *Nakell*, 15 F.3d at 325.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The writ should not be granted because Petitioner's contentions are moot, substantively without merit and barred by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). To the extent Petitioner's contentions may not be *Teague* barred, they involve simple application of a long established standard to a new fact pattern and do not raise issues worthy of this Court's review. Respondent is aware the determination of whether Petitioner's claims are precluded from review by *Teague* is a threshold issue. In this case, however, Respondents' *Teague* argument is best understood after discussion of the merits.

I. PETITIONER'S FEDERAL HABEAS ACTION IS MOOT DUE TO EXPIRATION OF HIS 10-DAY JAIL SENTENCE AND ABSENCE OF LEGAL COLLATERAL CONSEQUENCES.

Petitioner's habeas action should be deemed moot because Petitioner completed his ten-day jail sentence after his habeas action was filed and has suffered no legal collateral consequences. Thus Petitioner does not present a "live case or controversy" as required by Article III of the Constitution of the United States.

Under special circumstances, this Court found a federal habeas action was not moot because "collateral consequences" survived the sentence, *i.e.* the inability to engage in certain businesses, to serve as a juror or to vote. *Carafas v. LaVallee*, 391 U.S. 234, 237-38, 88 S. Ct. 1556,

1559, 20 L. Ed. 2d 554, 558 (1968). *See also Sibron v. New York*, 392 U.S. 40, 50-58, 88 S. Ct. 1889, 1896-1900, 20 L. Ed. 2d 917, 927-32 (1968) (misdemeanor); *Ginsburg v. New York*, 390 U.S. 629, 633 n. 2, 88 S. Ct. 1274, 1277 n. 2, 20 L. Ed. 2d 195, 200 n. 2 (1968). Here, however, Petitioner will suffer no legal collateral consequences. He will not be prevented from voting, N.C. GEN. STAT. § 163-55 (1991); serving on a jury, N.C. GEN. STAT. § 9-3 (1986); obtaining a license to practice law (Petitioner is already licensed)[2]; *In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979); becoming an official of a labor union, 29 U.S.C. § 504 (1990); or qualifying for state elective offices, N.C. Constitution, Article VI, §8. Nor will Petitioner's contempt conviction expose him to enhanced sentence if he commits a subsequent crime. N.C. GEN. STAT. § 15A-1340.4 (Cum. Supp. 1993). Although Petitioner may contend his reputation

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[2] Although disciplined by the North Carolina State Bar on February 4, 1992 for other reasons, Petitioner's contempt conviction challenged in this case was specifically excluded from discipline. The Consent Order of Discipline states in pertinent part:

> 1. The Hearing Committee considered the disposition of the Rule 11 proceeding in federal court and of the 1989 state court contempt proceeding and determined that no additional discipline is necessary or required as to that claim.

Thus Petitioner cannot fairly contend he is subject to further discipline for his contempt conviction.

suffered from the contempt conviction, this does not constitute a legal collateral consequence justifying federal habeas review. *Broughton v. North Carolina*, 717 F.2d 147, 149 n. 3 (4th Cir. 1983), *cert. denied*, 466 U.S. 940, 104, S. Ct. 1917, 80 L. Ed. 2d 464 (1984). *See also Lane v. Williams*, 455 U.S. 624, 632-33, 102 S. Ct. 1332, 1328, 71 L. Ed. 2d 508, 515-16 (1982).

In addition, potential reimbursement of Petitioner's $500.00 fine should not constitute a legal collateral consequence sufficient to justify further habeas review because imposition of a fine is insufficient to establish habeas jurisdiction under 28 U.S.C. § 2254(a) (1992) in the first instance. *Wright v. Bailey*, 544 F.2d 737 (4th Cir. 1976) (petitioner ordered to pay fine and costs was not "in custody" under §2254), *cert. denied*, 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 82 (1977); *Dremann v. Francis*, 828 F.2d 6 (9th Cir. 1987) (federal habeas jurisdiction did not attach to attorney who was not currently incarcerated for contempt conviction and would be incarcerated only if he continued to willfully refuse to pay $500.00 fine). *See also United States v. Michaud*, 901 F.2d 5 (1st Cir. 1990), *Tinder v. Paula*, 725 F.2d 801 (1st Cir. 1984), *Spring v. Caldwell*, 692 F.2d 994 (5th Cir. 1982), *rehearing denied*, 697 F.2d 1092 (1983), *Hanson v. Circuit Court of First Judicial Circuit*, 591 F.2d 404 (7th Cir. 1979), *cert. denied*, 444 U.S. 907, 100 S. Ct. 220, 62 L. Ed. 2d 143 (1979). If a habeas action cannot be initiated based soley upon a fine, it should not continue based soley opon potential reimbursment. *But, cf. Richmond Black Police Officers Association v. Richmond*, 548 F.2d 123, 129 (4th Cir. 1977) ("although the fines have

been paid, the case is not moot because the district judge levied the fines to be paid immediately subject to refund upon appellate reversal . . .") and *Port v. Head*, 764 F.2d 423, 427 (5th Cir. 1985) ("the fine, as a direct consequence of the contempt convictions, preserves the Port's stake in the merits of the appeal they bring before us, despite their release from custody."). In sum, Petitioner's federal habeas action should be deemed moot because his sentence has expired and he suffers no legal "collateral consequences."

II. THE DECISION OF THE COURT OF APPEALS FINDING PETITIONER'S SUMMARY CONTEMPT PROCEEDING SATISFIED DUE PROCESS WAS CORRECT AND CONSISTENT WITH *MAYBERRY V. PENNSYLVANIA* AND *TAYLOR V. HAYES*.

In his arguments I and II Petitioner contends he was entitled to a plenary contempt hearing before a different judge because (i) Judge Lake continued the on-going summary contempt proceeding for two days; (ii) Judge Lake became "personally embroiled" with Petitioner and Hatcher; (iii) Judge Lake requested affidavits from those present in the courtroom; and (iv) Judge Lake made a statement to the press before completion of the contempt proceeding. These contentions do not warrant further habeas review.

A. JUDGE LAKE'S DECISION TO CONTINUE THE SUMMARY CONTEMPT HEARING FOR FORTY-EIGHT HOURS TO AFFORD NAKELL AN OPPORTUNITY TO OBTAIN COUNSEL WAS CONSISTENT WITH DUE PROCESS.

The mandatory rule Petitioner urges this Court to adopt, *i.e.* that due process forbids a trial court from briefly continuing a summary contempt hearing until sometime after pending proceedings have concluded and that a plenary hearing is always required in such instances, has been squarely rejected by this Court. *See Sacher v. United States*, 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952); *Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). These decisions recognize the critical issue is not whether the hearing has been briefly continued, but whether the presiding judge has become personally embroiled.

For example, in *Sacher* this Court addressed the question of whether a trial court could summarily find persons in direct criminal contempt of court at the conclusion of trial rather than immediately when the contemptuous conduct occurred. At the completion of a celebrated nine-month trial of communist leaders under the Smith Act, the trial judge summarily found one defendant and defense attorneys in contempt and sentenced them to various terms not exceeding six months. This Court held the trial judge had discretion to wait until the end of trial before exercising summary contempt power. Justice Jackson wrote:

> [i]f the conduct of these lawyers warranted immediate summary punishment on dozens of

> occasions no possible prejudice to them can result from delaying it until the end of trial if the circumstances permit such delay. The overriding consideration is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to follow the procedure taken in this case. *Sacher*, 343 U.S. at 10, 72 S. Ct. at 455, 96 L. Ed. at 724.

A similar result was reached in *Ungar v. Sarafite*, 376 U.S. 557, 84 S. Ct. 841, 11 L. Ed. 2d 921. In *Ungar* a witness, in a state criminal trial who was also an attorney, refused to answer questions posed by the prosecution. When the judge pressed him to answer, he refused and stated the judge "coerced and intimidated and badgered" him and the judge was "suppressing the evidence." *Ungar*, 376 U.S. at 579-80, 84 S. Ct. at 844-45, 11 L. Ed. 2d at 925-26. The judge immediately informed Ungar he was "contemptuous . . . disorderly and insulent." *Id.* At the conclusion of trial, the judge served a show-cause order alleging contempt and ordering Ungar to appear in court four days later where the same judge found him guilty of contempt and sentenced him to ten days in jail and a $250.00 fine.

Although the notice of contempt was given pursuant to a "non-summary" contempt statute, 376 U.S. at 581, 84 S. Ct. at 845, 11 L. Ed. 2d at 926, Ungar contended the proceedings themselves were actually summary, apparently because the same judge presided at the contempt hearing. Therefore, Ungar argued before this Court, *inter alia*, that his due process rights were violated by, "the trial judge's

invoking of the summary power under [a New York statute] seven days after the end of the trial during which the contempt was committed, . . .". *Ungar*, 376 U.S. at 582, 84 S. Ct. at 846, 11 L. Ed. 2d at 927. This Court held that notwithstanding the strong, intemperate language Ungar used, the judge did not become embroiled with him and therefore could preside over the contempt hearing even though it was delayed for seven days after the conclusion of the trial. Furthermore, in his concurring opinion, Justice Harlan specifically acknowledged a trial judge can postpone a summary contempt proceeding for a few days after the close of trial and still proceed summarily.

> . . . Judge Sarafite, so far as the Federal Constitution is concerned, could have proceeded at the close of the main trial to hold Ungar in contempt without any hearing at all. The fact that the contempt adjudication followed a five-day notice given to Ungar two days after the close of the trial, cannot as a constitutional matter, well be deemed to have extinguished the judge's power to proceed summarily. *Ungar*, 376 U.S. at 591-92, 84 S. Ct. at 851, 11 L. Ed. 2d at 932 (J. Harlan concurring).

In addition, even in cases in which this Court has reversed summary contempt proceedings conducted after the close of trial, the Court has emphasized the critical factor was the trial judge's personal embroilment and not the mere fact the summary contempt proceedings were briefly delayed. *See, e.g., Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971); *Taylor v. Hayes*, 418

U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974). In *Mayberry*, the state trial judge was subjected to a barriage of personal insults from the contemnor. This Court held a trial judge so cruelly slandered by the contemnor could not preside at a summary contempt proceeding delayed until the end of trial. According to this Court, when a trial judge ". . . does not act the instant the contempt is committed but waits until the end of trial, on balance it is generally wise *where the marks of the unseemly conduct have left personal stings* to ask a fellow judge to take his place." 400 U.S. at 463-64, 91 S. Ct. at 504, 27 L. Ed. 2d at 539 (emphasis added). Thus, the critical factor in *Mayberry* was the unseemly personal stings left by the contemnor's verbal attack and not the mere fact the proceedings had been delayed until sometime after trial. Because, as described above, Petitioner did not verbally attack Judge Lake but simply refused to obey his instructions, recusal was not required here as it was in *Mayberry*. Similarly, in *Taylor* this Court again acknowledged that ". . . summary punishment need not always be imposed during trial if it is to be permitted at all." 418 U.S. at 497-98, 94 S. Ct. at 2703, 41 L. Ed. 2d at 907. However, in *Taylor* this Court found "marked personal feelings" existed between the contemnor and the trial judge requiring a new contempt hearing before a different judge. As set forth below, however, there were no such "marked personal feelings" between Nakell and Judge Lake. Thus the finding of contempt in the case at bar was not inconsistent with *Taylor*.

In sum, contrary to Petitioner's arguments I and II, there is no mandatory requirement that whenever a court

continues a contempt hearing until conclusion of the proceedings and then for an additional two days that the hearing must be plenary. The Court of Appeals correctly held Petitioner's summary contempt proceeding satisfied due process and this conclusion is consistent with *Mayberry* and *Taylor*.

B. JUDGE LAKE WAS NOT "PERSONALLY EMBROILED" WITH NAKELL.

While a judge who is so cruelly slandered by a contemnor that he is unlikely to maintain his calm detachment should allow another judge to adjudicate the contempt, *Mayberry*, 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532, "there is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir.), *cert. denied*, 368 U.S. 927, 82 S. Ct. 361, 7 L. Ed. 2d 190 (1961). Furthermore, there is every practical reason why a contempt hearing should not be transferred to another judge. Generally, it would result in needless delay and waste of judicial resources. Another judge would not possess the advantage of having observed the contemnor and his demeanor when the events occurred. The fundamental premise of contempt of court is that the judge, in whose presence it occurs, is best fitted to pass upon it, save in exceptional cases. *See Blankenburg v. Commonwealth*, 272 Mass. 25, 172 N.E. 209 (1930), *cert. denied*, 283 U.S. 819, 51 S. Ct. 344, 75 L. Ed. 1435 (1931). The case at bar does not present such an exception.

Judge Lake's statements prior to sentencing Nakell bear out his befitting judicial decorum and shows he bore no personal anamosity toward Nakell. (App 7a) Furthermore, contrary to Petitioner's suggestion there is no evidence showing Judge Lake was unable to distinguish Nakell's contemptuous conduct from that committed by Hatcher even though Nakell's conduct resulted in applause from the audience and Hatcher's violent outburst. The behavior and comments of Nakell, while clearly contemptuous, were not such that "a judge of ordinary sensibilitites might naturally be expected to harbor 'marked personal feelings' against the attacker, . . .". *United States v. Meyer*, 462 F.2d 827, 839 (D.C. Cir. 1972). Contemptuous behavior which requires recusal must be obviously and highly personal attacks on the sitting judge. For instance, the conduct found so highly personal as to require recusal in *Mayberry* consisted of the contemnor calling the judge "a dirty son-of-a-bitch", a "fool" and a "stumbling dog". 400 U.S. at 466, 91 S. Ct. at 505, 27 L. Ed. 2d at 540. Nakell's conduct in no way rose to the highly personal nature of the remarks in *Mayberry*. Thus the Court of Appeals' decision upholding Nakell's contempt conviction was not inconsistent with this Court's holding in *Mayberry*.

In addition, *Taylor v. Hayes*, 481 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 emphasized it is not the contemnor's behavior standing alone which requires recusal, but rather a critical factor is the character of the court's response to the behavior. The record reveals no evidence of Judge Lake becoming personally embroiled or "doing battle with" Nakell. Rather, the record shows the court's character in

response to Nakell was superlative. (App 7a) Furthermore, the short length of Nakell's 10-day jail sentence also indicates Judge Lake did not become personally embroiled. It is no coincidence that this Court's most noted decisions reversing contempt convictions involved very lengthy jail terms imposed by lower courts on the contemnor. For example, in Justice Harlan's concurring opinion in *Mayberry*, he noted the defendant in that case had received a 22-year sentence for eleven acts of contempt. According to Justice Harlan, "[t]hat circumstance seems to me to deprive the contempt proceeding of the appearance of even-handed justice which is at the core of due process." 400 U.S. at 469, 91 S. Ct. at 507, 27 L. Ed. 2d at 542. In *Taylor*, the trial court originally sentenced the contemnor to a total of four and one-half years for nine counts of direct criminal contempt. This Court stated "[w]e assume for the purposes of this case that each of the charged acts was contemptuous; nevertheless, a sentence of this magnitude reflects the extent to which the respondent [judge] became personally embroiled." 418 U.S. at 502-03, 94 S. Ct. at 2705, 41 L. Ed. 2d at 910. In the case at bar, however, Nakell's 10-day sentence and $500.00 fine compare favorably to the six month sentences in *Sacher*, and the 10-day sentence and $250.00 fine in *Unger*, in which the contempt convictions were upheld. Certainly nothing related to Petitioner's sentence betrays any "personal embroilment" on Judge Lake's part.

C. JUDGE LAKE DID NOT BECOME PERSONALLY EMBROILED WITH NAKELL BY REQUESTING THE LAWYERS AND COURT REPORTER TO PROVIDE AFFIDAVITS DESCRIBING WHAT THEY OBSERVED.

Although Petitioner characterizes this action as an investigation the record shows Judge Lake simply asked the court reporter and the lawyers, who are officers of the court, to provide affidavits describing what they saw. This action was apparently taken to further preserve the record for appellate review and did not prejudice Petitioner in any way. Furthermore, it did not evince "personal embroilment" on Judge Lake's part.

D. JUDGE LAKE'S STATEMENT TO A REPORTER DID NOT INDICATE IMPERMISSIBLE PREJUDGMENT OF NAKELL'S GUILT.

While Judge Lake acknowledged an individual, apparently a reporter, called him on the telephone about this case, the evidence shows Judge Lake merely gave him a rough recitation of the contempt charge against Nakell which anyone present in the courtroom would have heard, *i.e.* "Mr. Nakell had been disruptive of the proceedings, pandering to the audience and the defendant and encouraging Mr. Hatcher to be disruptive" and "[a]fter repeated interruptions Judge Lake said in an interview, he ordered Mr. Nakell to sit down and be quiet. The lawyer, however, continued to stand pleading Mr. Hatcher's case."

Whether Judge Lake's statement to a reporter constituted a technical violation of the Canons of Judicial Conduct is not a matter for adjudication here. Judge Lake's statement, however, did not indicate improper prejudgment of Nakell's guilt. In *Ungar*, after the witness made contemptuous statements to the court, the judge immediately responded "[y]ou are not only contemptuous but disorderly and insulent." *Ungar*, 376 U.S. at 580, 84 S. Ct. at 845, 11 L. Ed. 2d at 926. On appeal Ungar contended, as does Nakell, that these statements by the judge evinced prejudgment requiring the case be heard before another judge in a plenary hearing. This Court rejected this argument and held:

> [t]he characterization of Petitioner's conduct as contemptuous, disorderly and malingering was at most a declaration of the charge against the petitioner, based on the judge's observations, which, without more, was not a constitutionally disqualifying prejudgment of guilt, just as issuance of a show-cause order in any criminal contempt case, based on information brought to the attention of a judge, is not such a prejudgment of guilt. *Ungar*, 376 U.S. at 586-88, 84 S. Ct. at 848-49, 11 L. Ed. 2d at 930.

Similarly, in the case at bar, Judge Lake's rough recitation of the contempt charge to the reporter did not constitute impermissible prejudgment of Nakell's guilt.

In addition, a recent decision of this Court involving a recusal motion under 28 U.S.C. § 455(a) (1988),

emphasized that:

> judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias for partiality charge. . . . they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. *Liteky v. United States*, ___ U.S. ___, ___, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474, 491 (1994).

Here, Judge Lake's comments to the reporter did not reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." Perhaps the district court summarized this matter the best when it stated "Judge Lake's response to the media, although in hindsight was not a wise judicial activity, did not reveal any prejudice or display any bias. It was merely a rough recitation of the direct criminal contempt charges stated in open court on November 14, 1989." In any event Petitioner's summary contempt hearing was not fundamentally unfair entitling him to habeas relief.

III. THE COURT OF APPEALS' DECISION FINDING SUFFICIENT EVIDENCE TO SUPPORT NAKELL'S CONVICTION IS CORRECT AND CONSISTENT WITH *IN RE MCCONNELL* AND THE NINTH CIRCUIT OPINION IN *GREENBERG*.

The standard of review on habeas corpus of a claim of insufficient evidence is whether, after viewing the

evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 81 L. Ed. 2d 560 (1979); *Wright v. West*, 505 U.S. ___, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992).

To convict Nakell of direct criminal contempt the state had to prove he (i) committed a contemptuous act within sight or hearing of a presiding judge; (ii) in immediate proximity to the proceeding; and (iii) was likely to interrupt or interfere with matters then before the court. N.C. GEN. STAT. § 5A-13 (1986). A contemptuous act includes: wilful behavior committed during the sitting of a court directly tending to interrupt its proceedings; wilful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority; or wilful disobedience of, resistence to, or interference with a court's lawful process, order, directive or injunction or its execution. N.C. GEN. STAT. § 5A-11 (1986). The evidence in this case was sufficient to support Nakell's conviction.

Here, Nakell entered the courtroom during on-going proceedings, tendered a notice of limited appearance to the clerk and interrupted the court and asked to be heard. Judge Lake said "[n]o, [s]ir, not at this point." Nakell interrupted again and Judge Lake informed him that his notice of limited appearance was not in compliance with Judge Farmer's September 6 order. Nakell continued to speak and Judge Lake told him "[n]o, [s]ir, Mr. Nakell, I'm not going to hear

you." When Nakell continued, Judge Lake responded "I said I'm not going to hear you. Sit down. Sit down." Judge Lake asked Nakell "[d]o you want to be removed from this courtroom?" Nakell continued to speak and Judge Lake told him "I said sit down, Mr. Nakell. That's a direct order from the Court."

When Nakell continued to speak, Judge Lake said "[d]o you want to be held in direct criminal contempt of this Court?" At that point, Hatcher blurted obscenities and Nakell continued to assert his position. Judge Lake responded, "I am directing you specifically to sit down and be quiet." A few minutes later Nakell rose to address the court and Judge Lake said "I'm going to direct you not to interrupt me now. If you want to . . . pose a question to the court, you do so through Mr. Thompson." Again Nakell refused to comply and Judge Lake said "[t]he court does not recognize your representation of this defendant." Finally, Judge Lake said "[w]ell, let me see if I can make you understand, Mr. Nakell. I am denying your request for a limited appearance on behalf of this defendant and I am directing you to sit down and be quiet and not say another word to the court except if you want to say something, do it through Mr. Thompson." Then, without sitting down, Nakell turned to Mr. Thompson and in the same tone of voice used to address the court, said, "[a]lright. Mr. Thompson would you inquire about the basis - legal basis for a licensed North Carolina attorney from appearing on behalf of a defendant in a criminal case in association with the public defender -". Judge Lake tried to interrupt Nakell and Hatcher blurted obscenities while Nakell continued to talk.

At this point, Judge Lake ordered the bailiff to remove Nakell from the courtroom. Hatcher then threw two pens at the bench, blurted more obscenities and had to be removed. This evidence, viewed in the light most favorable to the state was more than sufficient to allow a rational trier of fact to find Nakell guilty of direct criminal contempt beyond a reasonable doubt.

In addition, the Court of Appeal's decision is consistent with *In re McConnell*, 370 U.S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962) and *Matter of contempt of Greenberg*, 849 F.2d 1251 (9th Cir. 1988). In *McConnell*, a lawyer was prohibited by the trial judge from asking a line of questions. The lawyer complained he had a right to ask the questions and would continue to "to do so unless some bailiff stops us." 370 U.S. at 235, 82 S. Ct. at 1292, 8 L. Ed. 2d at 438. This Court held the lawyer's comments were nothing more than strenuous, presistent advocacy insufficient to support a contempt conviction. Nakell's conduct and statements, however, were far more egregious than those in *McConnell*. Nakell repeatedly refused Judge Lake's orders to sit down and be quiet and as stated by the district court "[i]nstead of quietly asking Mr. Thompson to pose his question to the court, Mr. Nakell audibly addressed Mr. Thompson, which action this court views as deliberate disrespect." Thus nothing in *McConnell* is inconsistent with the finding of contempt in the case at bar.

Nor is the Court of Appeals' decision inconsistent with *Greenberg*, 894 F.2d 1251. There, an attorney was convicted of contempt in a summary proceeding for loudly

stating an objection, slamming his hand on counsel table, twice asking for a ruling and refusing to sit down until asked twice. The Ninth Circuit found this conduct standing alone insufficient basis for a summary contempt conviction. As set forth above, however, Nakell's conduct far exceeded that of the lawyer in *Greenberg* and thus the Ninth Circuit's decision is not inconsistent with the finding of contempt in this case. In sum, sufficient evidence supported Nakell's conviction and further review is unwarranted.

IV. PETITIONER'S HABEAS ACTION IS *TEAGUE* BARRED.

Respondents did not raise *Teague* in either the district court or the Court of Appeals. As recently noted by this Court, however, the prevailing party "is entitled to rely on any legal argument in support of the judgment below." *Schiro v. Farley*, ___ U.S. ___, ___, 114 S. Ct. 783, ___, 127 L. Ed. 2d 47, 57 (1994), *citing Dandridge v. Williams*, 397 U.S. 471, 475-76 n. 6, 90 S. Ct. 1153, 1156-57 n. 6, 25 L. Ed. 2d 491, 496 n. 6 (1970). Admittedly, this Court rarely addresses arguments not raised below, but given the threshold nature of *Teague* it should be allowed here.

Although Petitioner's due process claim appears to involve nothing more than simple application of a long established standard to a new fact pattern, Petitioner does seek a "new rule" of constitutional adjudication to the extent he argues a contempt hearing must be plenary rather than summary when held two days after the conclusion of the proceedings. As set forth above in Argument II, this assertion is flatly contradicted by this Court's decisions in *Sacher* and *Ungar* where delays in summary, or allegedly summary, contempt proceedings were approved, *e.g.*, in one

instance up to seven days after trial. Thus to adopt Petitioner's claim would necessarily contradict *Sacher* and *Ungar* and thereby create a "new rule" of constitutional adjudication prohibited by *Teague*. *See generally*, *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990); *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); *Caspari v. Bohlen*, ___ U.S. ___, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994).

In addition, although a majority of this Court in *Wright v. West*, 505 U.S. ___, 112 S. Ct. 2482, 120 L. Ed. 2d 225 declined the invitation to apply *Teague* to the issue of insufficiency of the evidence, Respondents believe it is the appropriate standard. The decision of the North Carolina Court of Appeals finding sufficient evidence was a reasonable, good-faith application of existing law, and its decision should not be second-guessed on habeas review. *See Butler* and *Saffle*. Finally, the "new rules" urged by Petitioner fall within neither of the *Teague* exceptions since they would not decriminalize a class of conduct or establish "watershed rule[s] of criminal procedure" implicating fundamental fairness. *Saffle*, 494 U.S. at 494, 110 S. Ct. at 1263, 108 L. Ed. 2d at 428-29. In sum, Petitioner's contentions should be precluded from review by *Teague*.

CONCLUSION

The writ of certiorari should not be granted in this case because Petitioner's habeas action is moot, substantively without merit and *Teague* barred. The Court of Appeals' decision was correct and consistent with decisions of this Court and the Ninth Circuit.

Respectfully submitted,

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July 26, 1994

APPENDIX

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APPENDIX

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JUDGE LAKE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

All right. Madam court reporter, madam clerk, upon the foregoing showing, the evidence presented to the Court, the response to the Court by Mr. Nakell directly through his own testimony and through counsel, consideration of the transcript of the proceedings immediately past in the Eddie Hatcher motion hearing, said the Court's very vivid recollection of those events, the Court makes the following findings of fact. Each of these findings the Court finds beyond a reasonable doubt.

The Court -- upon the call of the cases of Eddie Hatcher for a motion hearing November 14 at ten past four o'clock in the evening, the defendant appeared in person, Mr. Hatcher, with court-appointed counsel, Mr. Angus Thompson, the Court -- the public defender, with assistant Freda Bowman. The hearing commenced at that time with the State being represented by District Attorney Richard Townsend.

The Court further finds that while the Court was recognizing the persons present representing the various parties, the State and the defendant, and stating the -- beginning to state the predicate for the hearing, that is, what was before the Court, the pro se motion by Eddie Hatcher for self-representation and the second motions for reconsideration -- or motion for reconsideration filed that day by Mr. Thompson and Mr. Nakell on behalf of the defendant, the Court while proceeding to state the predicate and the previous orders entered by the Court, the most recent

orders, noted Mr. Nakell's entry into the courtroom and his approach to and sitting at counsel table with the defendant, Eddie Hatcher.

The Court then proceeded to state to the parties the Court's understanding of the previous orders entered by the Court, specifically the last three orders entered by Judge Farmer of September 5, September 6 and October 16, 1989. The Court was -- during the course of trying to establish the predicate and the order appearing of the matters before the Court, including the defendant's second motion for reconsideration for out of state counsel, the Court was addressed at least three times by the respondent, Barry Nakell, and was told following the initial communication that he would not be heard at that time and to sit down and be quiet.

The Court further finds that the defendant -- the respondent, rather, Mr. Nakell, on at least three occasions refused to do so and continued to address the Court, stating the arguments that he has again put forth here today. All of which considerably delayed the Court and interrupted the Court's statement of the predicate or matters before the Court and the order in which the Court desired to hear them.

The Court further finds that it was made abundantly clear on several occasions to Mr. Nakell that the Court was only recognizing Attorney Angus Thompson as the only attorney of record for the defendant, Eddie Hatcher, and that the Court was not recognizing Mr. Nakell, not accepting his limited appearance on the basis that it did not conform or

comply with the order of September 6 entered by Judge Robert Farmer.

The Court finds as a fact that there was not and could not have been any misunderstanding in the mind of Mr. Nakell as to the Court's ruling and that he was not being recognized by the Court and that the Court desired for him to sit down and be quiet.

The Court further finds as a fact that after it was made abundantly clear to Mr. Nakell the Court's ruling with regard to the reaffirmation of Judge Farmer's order that he was not recognized by the Court as having standing in the Court, the defendant further proceeded to address the Court, make arguments to the Court, repeating arguments previously made and ruled upon by Judge Farmer and by this Court.

That the Court again at that point told Mr. Nakell to sit down. He was directed specifically not to interrupt the Court.

The Court further finds that Mr. Nakell further at that point was specifically directed that if he wished to make any communication to the Court, that he do so through Mr. Angus Thompson.

The Court finds as a fact that Mr. Nakell fully understood that and the import of that directive.

That thereafter -- the Court further finds that thereafter, the Court again directed Mr. Nakell after being interrupted by Mr. Nakell and being advised again by the

Court that he was denying his request for limited appearance and being directed to sit down and be quiet and not say another word to the Court except through Mr. Thompson, that at that point Mr. Nakell did not sit down, he remained standing. He turned sideways to the Court toward Mr. Thompson and in the same tone of voice and with the same volume asked the same repeated question and argument requesting that Mr. Thompson ask the Court the legal basis for the Court's ruling which had already been explained to Mr. Nakell.

That the Court tried to interject by saying, "Mr. Nakell." Mr. Nakell refused to heed the Court and continued with his statement to the Court while looking at Mr. Thompson.

The Court finds further as a fact that at that point, the Court directed the bailiff to remove Mr. Nakell, and at that point immediately following Mr. Nakell's statement and the Court's direction to the bailiff, the effect of Mr. Nakell's statement to Mr. Thompson was substantial applause from the audience from supporters of Mr. Hatcher.

That the Court further finds that immediately at that point as Mr. Nakell was turning with the bailiff toward the door, the effect on the defendant of Mr. Nakell's statement to Mr. Thompson was further obscenities directed to the bench, followed immediately by the defendant, Eddie Hatcher's, resort to violence and an attack upon the Court by throwing a pen or some other object which struck the court bench.

The Court finds as a fact in the Court's close and direct observation of the entire sequence of these events including the tone of voice of Mr. Nakell, the expression on his face, and the volume of his voice in directing his inquiry -- his further inquiry to the Court while looking at Mr. Thompson was the direct cause of the disturbance and applause from the audience and was the direct cause of Mr. Hatcher's behavior in exceeding his previous attacks on the Court by his language and launching into a violent attack upon the Court.

The Court further finds as a fact that all of the foregoing occurred in the direct view and observation of the Court.

The Court further finds as a fact that the conduct of the defendant was willfully contemptuous, was deliberate and calculated and designed to disrupt the proceedings of the Court.

The Court further finds as a fact that the foregoing acts of the defendant were preceded by numerous distinct, direct and clear warnings by the Court that the conduct was improper.

Upon the foregoing findings of fact, the Court makes and enters the following conclusions of law.

The conduct of Attorney Barry Nakell constituted willful behavior committed during the sitting of a Court and directly tended to interrupt its proceedings. That's number one.

Number Two, the conduct of Attorney Barry Nakell constituted willful behavior committing during the sitting of a Court in its immediate view and presence and directly tended to impair the respect due the authority of the Court.

Number Three, the conduct of Attorney Barry Nakell constituted willful disobedience of and resistance to or interference with a Court's lawful directive and order.

Whereupon, the Court finds and holds the defendant guilty of direct criminal contempt of court.

JUDGE LAKE'S COMMENTS BEFORE ENTERING HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW

You mentioned toward the close of your argument the difficulties of Mr. Nakell in representing a volatile client and in a volatile situation. It certainly was that.

It's unfortunate that for the sake of his attorneys, both Mr. Thompson, Mr. Nakell while he was here involved in the case, and the other attorneys, had to endure what I know they had to endure in trying to represent Mr. Hatcher. And I'm very sympathetic to that. I've had clients like that myself when I was practicing law.

But the attorneys regardless of their clients have got to be aware of the overall situation and mindful that the judge has got to try to keep a lid on the situation to keep it from exploding. And that's why the judge must be in control of the courtroom. That's why his orders and directives to attorneys and to parties, litigants, have to be complied with.

I wish that Mr. Nakell's demeanor Tuesday had been what it was today, and his conduct. I, perhaps, have the best vantage point of anybody in any courtroom, any judge does, of what is going on directly in front of the bench in particular. A judge can see the expression on the faces of whoever's involved, the body language, the coloration of the face. It can hear the tone of voice and see the reactions, perhaps -- not perhaps, certainly better than anybody else in the courtroom.

As far as the -- this Judge is concerned, as I told Mr.

Hatcher, nothing he said or did was going to bother me, and it didn't. Personally, what Mr. Nakell said and did did not bother me. It bothered me as a lawyer. It bothered me as a judge. It bothered me as an officer of the Court and the State presiding over a courtroom in a highly volatile situation. It bothered me from the standpoint of having to maintain control and to keep violence from erupting and to maintain not on behalf of myself but on behalf of the court system the proper decorum and respect for the Court because I think, as you've alluded to, without that our whole system is going to collapse.

I'm not concerned with respect to this proceeding with the several times that I told Mr. Nakell to sit down and be quiet before we had several long exchanges and he did get to say what he wanted to say, not that I wanted to hear it, but he said it. I'm not concerned with that except as a -- as it bears on what happened later. When, as Mr. Nakell has said on the stand, there was no question in his mind that I had ruled to affirm Judge Farmer's order and that I considered Mr. Thompson the only attorney in the courtroom for Mr. Hatcher. There was no question in Mr. Nakell's mind at that point. No question that I did not want to hear from him directly, that I wanted him to sit down and be quiet.

What bothers me and why I had Mr. Nakell removed was with all of that predicate, he then turned, in what I saw and perceived to be a most disrespectful manner, to Mr. Thompson after being directly ordered to sit down and be quiet and not address the Court, but to communicate only

through Mr. Thompson, he refuses to do that, remains standing and in a loud voice directs again his same inquiry to the Court but by looking at Mr. Thompson and saying, Mr. Thompson, will you ask.

The respondent, Mr. Nakell, may not have intended or expected the audience reaction, may or may not have, I can't say. But the audience reaction from the supporters of Mr. Hatcher speak more eloquently than anything else the way in which Mr. Nakell had conducted himself at that point toward the Court.

It was at that point that I saw I had no alternative but to remove Mr. Nakell. And the immediate effect of that, the bailiffs coming up, following the outburst from the audience, was the violent attack, harmless in result, but a violent attack by Eddie Hatcher against the Court.

As far as my personal feelings are concerned, I've had defendants throw much worse things than pens at me. I've had an entire counsel table thrown at me. So from a personal standpoint, it's of no consequence to me either what Mr. Hatcher did nor what Mr. Nakell did. My concern is for the courts and the law.

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